FILE COPY.

Nos. 269 AND 652. OF OCTOBER TERM, 1905.

IN THE

Supreme Court of the United States.

The United States, Appellant,

vs.

The American Sugar Refining Company of New York.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

[File No. 19,770.]

Office Supreme Court U. S.
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APR 26 1906
JAMES H. McKENNEY,
Clerk.

Franklin Sugar Refining Company, Appellant,

vs.

The United States.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

[File No. 20,154.]

BRIEF FOR THE SUGAR REFINING COMPANIES.

JOHN E. PARSONS,
JOHN G. JOHNSON,
H. B. CLOSSON,
For Sugar Refining Companies

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Press of Allen, Lane & Scott, Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1905. No. 269.

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BRIEF OF SUGAR REFINING COMPANIES, RESPECTIVELY APPELLEE AND APPELLANT.

The appeals are, respectively, one by the United States, from a judgment of the Circuit Court of the United States for the Southern District of New York, in favor of the American Sugar Refining Company; and the other, from a judgment by the Circuit Court of the United States for the Eastern District of Pennsylvania, adverse to the Franklin Sugar Refining Company.

In each case, the claim of the Refining Company is, that ten days after the exchange, on the 31st March, 1903, of ratifications of the convention of the 11th December,

1902, between the United States of America and the Republic of Cuba, viz., on the 10th April 1903, sugar imported into the United States from Cuba became entitled to a reduction of twenty per centum of the duty imposed by the Tariff Act of the United States, approved 24th July, 1897. This claim is denied by the United States, which contends that the reduction did not begin until ten days after the issuance by the President of the United States, on the seventeenth day of December, 1903, of his proclamation. The date of this proclamation, and that of the passage of an Act of Congress upon the subject, to which reference will later be made, are the same.

The Collector of Customs of the Port of New York, in the case of the American Sugar Refining Company, and of the Port of Philadelphia, in that of the Franklin Sugar Refining Company, refused to make the reductions.

In New York the sugars were entered for consumption at various dates, between the 12th June, 1903, and the twenty-eighth day of September, 1903. An estimate of the duties having been made, the amount thus estimated was paid and, prior to December, 1903, the sugars were withdrawn. The duties were liquidated provisionally on or about the 15th October, 1903. Protests were duly filed. An appeal was taken to the Board of General Appraisers, which, on the 28th April, 1904, decided against the protestants. This decision was appealed to the Circuit Court for the Southern District of New York, which reversed the same. From the decision of that court the United States appealed. Its appeal is No. 269.

The sugars in Philadelphia, were imported on or about the 29th September, 1903, and were entered in bonded warehouse. On or before the 17th December, 1903, the duties were estimated and were paid. Permits for the removal for consumption from the warehouse, were delivered to the Refining Company prior to December, 1903. All sugar was actually removed before that date, except 4529 bags of sugar and 67 bags of

sweepings. These were not removed until the twenty-eighth and twenty-ninth days of December, 1903, respectively. In Philadelphia, the liquidation of duty was made on the twenty-fifth day of March, 1904. Protests were duly filed, demanding *inter alia*, reliquidation, which reliquidation was refused on the twenty-fourth day of June, 1904. An appeal, taken to the Board of General Appraisers, was decided adversely to the claim of the Refining Company. From that decision an appeal was taken to the Circuit Court of the United States for the Eastern District of Pennsylvania, which sustained the Board of General Appraisers.

The appeal from the decision of that court is No. 652.

The Refining Companies contend: (1) that all the sugars imported after the tenth day of April, 1903, were entitled to an allowance of twenty per centum, and (2) that, in any event sugars not actually removed from the bonded warehouse until after the twenty-seventh day of December, 1903, were thus entitled.

A convention between the United States and Cuba, duly signed and sealed by the respective plenipotentiaries, bearing date 11th December, 1902, provided, *inter alia* (Record 26):—

> "The President of the United States of America
> "* * * and the President of the Republic of Cuba
> "* * * have in consideration of and in compen-
> "sation for the respective concessions and engage-
> "ments made by one to the other, as hereinafter re-
> "cited, agreed, and do hereby agree upon the follow-
> "ing Articles for the regulation and government of
> "their reciprocal trade, namely:—
>
> "ARTICLE II.
>
> "During the term of this convention all articles of
> "merchandise not included in the foregoing Article
> "I., and being the product of the soil or industry of
> "the Republic of Cuba imported into the United
> "States shall be admitted at a reduction of 20 per
> "centum of the rates of duty thereon, as provided by

"the Tariff Act of the United States approved July "24th, 1897, or as may be provided by any Tariff Law "of the United States subsequently enacted.

"ARTICLE III.

"During the term of this Convention, all articles of "merchandise not included in the foregoing Article "I. and not hereinafter enumerated, being the product "of the soil or industry of the United States imported "into the Republic of Cuba shall be admitted at a "reduction of 20 per centum of the rates of duty "thereon, as now provided or may hereafter be pro- "vided by the Customs Tariff of the Republic of "Cuba."

In the articles from IV. to VII. inclusive, there were provisions, "during the term of this Convention," for reductions upon various articles therein enumerated, "being "the product of the soil or industry of the United States "imported into Cuba," of the rates of duty thereon as theretofore provided, or as might, thereafter be provided, by the Customs tariff, of the Republic of Cuba.

Article XI. of the convention reads thus (Record 30) :—

"The present Convention shall be ratified by the "appropriate authorities of the respective countries "and the ratifications shall be exchanged at Wash- "ington, District of Columbia, United States of "America, as soon as may be before the thirty-first "day of January, 1903, and the Convention shall go "into effect on the tenth day after the exchange of "ratifications, and shall continue in force for a term "of five years from the date of going into effect and "from year to year thereafter until the expiration of "one year from the day when either of the contract- "ing parties shall give notice to the other of its in- "tention to terminate the same."

The President transmitted the convention to the Senate on the 16th December, 1902, and invited its attention to the fact that the time within which the ratifi-

cation must take place was, by the terms thereof, limited to 31st January, 1903. On the 26th January, 1903, however, a supplementary convention was made between the United States and Cuba which extended the time for ratification, in the following words:—

> "The respective ratifications of the said Conven-
> "tion shall be exchanged as soon as possible, and
> "within two months from January 31st, 1903."

The Senate having been convened in extraordinary session for the sole purpose of considering this convention and a pending treaty with the Republic of Columbia, its Committee on Foreign Relations, on the 12th March, 1903, reported the treaty, with amendments, which added the word "cattle" to schedule C, *i. e.* to a schedule which provided for a reduction of forty per centum on certain articles therein enumerated, the product of the soil or industry of the United States imported into Cuba.

At the end of article VIII, which, as originally executed, had provided that the rates of duty therein granted to the United States by the Republic of Cuba were to continue during the term of the convention, preferentially in respect to all like imports from other countries, and that because of the concession in that respect, "dur-"ing the term of the Convention," the rates of duty granted by the Republic of Cuba on the products of the United States should likewise be and continue similarly preferential, was added a proviso reading thus (Record 29) :—

> "*Provided*, That while this Convention is in force
> "no sugar imported from the Republic of Cuba, as
> "being the product of the soil or industry of Cuba,
> "shall be admitted into the United States at a reduc-
> "tion of duty greater than 20 per centum of the rates
> "of duty thereon, as provided by the Tariff Act of the
> "United States, approved July 24th, 1897, and no
> "sugar the product of other foreign countries, shall
> "be admitted by Treaty or Convention with the
> "United States while this Convention is in force, at

"a lower rate of duty than that provided by the Tariff "Act of the United States approved July 24th, 1897."

At the end of article XI. were added the following words (Record 30):—

"This Convention shall not take effect until the "same shall have been approved by the Congress."

Reference to the *Congressional Record* of November 30th, 1903, gives the following explanation by Senator Bacon, at a time when the House bill to carry the convention into effect was under discussion in the Senate, of the intent of this addition:—

"The provision in the treaty which requires this "legislation may in the language which is used be "misleading. * * * when it says that 'this con-"'vention shall not take effect until the same shall "'have been approved by the Congress.' I very "frankly confess that the language is not felicitously "chosen. I offered that as an amendment to the "treaty. It was not a part of the treaty as originally "negotiated by the President and sent to the Senate. "I am the author of it so far as this treaty is con-"cerned, and I wish to say now that I used that lan-"guage, not because I thought it was the best lan-"guage for the purpose, but because the Foreign "Relations Committee had previously used the same "language as to other reciprocity treaties, and I did "not wish that there should be any issue raised by "its opponents as to phraseology. The idea that the "Congress can approve a treaty is utterly fallacious. "Congress has no such prerogative and can perform "no such office. The proper language would have "been that 'this convention *shall not have been of* "'*binding force until made effectual by Act of Congress,* "'*which shall enact a tariff law in accordance there-*"'*with.*'"

The "other reciprocity treaties" referred to by Senator Bacon are those which were under consideration by the Senate on December 15th, 1902, when the report of its

Committee on Foreign Relations was submitted to it. (57th Congress, 2d Session: Senate Document S. B. 47.) In this report, the question whether certain reciprocity treaties might still be ratified by the Senate, although the two years stipulated for that purpose in section 4 of the Act of July 24th, 1897, had expired, was considered and answered in the affirmative. It likewise contained the following:—

> "Whether such treaties operate without the ap-
> "proval of Congress to change tariff duties thereto-
> "fore fixed by law is a question not involved, and
> "upon which the sub-committee expresses no opin-
> "ion. * * * It is entirely competent for the
> "Senate to amend these treaties so as to provide that
> "they shall not take effect *without the approval of*
> "*Congress.*"

Several treaties have thus been provided, among others, that with the Hawaiian Government in 1876. The sub-committee, therefore, recommended, without reference to the merits thereof, that each of said treaties be amended by the Senate by inserting therein the following additional provision: "This treaty shall not take "effect until the same shall have been approved by the "Congress."

The amendments recommended by the Foreign Relations Committee were, on the 10th March, 1903, adopted by the Senate, and the ratification of the convention as thus amended was advised by it.

On 22d March, 1903, the President of the Republic of Cuba convened an extraordinary session of the Senate of Cuba for the purpose of ratifying the treaty as amended by the United States Senate, and on the 23d March, he sent a message to it, to the effect that unless the amendments recommended by the United States Senate on 12th March, 1903, should be by it approved, it would be impossible to conclude the reciprocity treaty.

On 27th March, 1903, Secretary Hay sent a warning to Cuba, that the slightest amendment to the Reciprocity Treaty by the Cuban Senate, would defeat the

convention itself, since any amendments must be submitted to the United States Senate, and, before this could be done, the date fixed for the final exchange of ratifications, viz., March 31st, 1903, would have passed.

On the 28th March, 1903, the convention was ratified by the Cuban Senate, and on March 30th it was ratified by the Presidents of the United States and of Cuba.

On 31st March, 1903, ratifications were exchanged.

Congress, on the 17th December, 1903, gave its approval by an Act to carry the provisions of the treaty into effect, which was entitled "An Act to carry into "effect a convention between the United States and the "Republic of Cuba, signed on the eleventh day of Decem-"ber, in the year 1902." Stats. at Large 58th Cong., 1st Session, p. 3).

The first section of this Act provided, *inter alia*, as follows:—

> "Whenever the President of the United States "shall receive satisfactory evidence that the Repub-"lic of Cuba has made provision to give full effect "to the articles of the convention between the United "States and the Republic of Cuba, signed on the elev-"enth day of December, in the year nineteen hundred "and two, he is hereby authorized to issue his proc-"lamation declaring that he has received such evi-"dence, and thereupon, on the tenth day after ex-"change of ratifications of such convention between "the United States and the Republic of Cuba, and so "long as the said convention shall remain in force, "all articles of merchandise being the product of the "soil or industry of Cuba which are now imported "into the United States free of duty shall continue "to be so admitted free of duty, and all other arti-"cles of merchandise being the product of the "soil or industry of the Republic of Cuba imported "into the United States shall be admitted at a reduc-"tion of twenty per centum of the rates of duty "thereon, as provided by the tariff act of the United "States. * * *"

At the end of the first section there is the following proviso:—

"That nothing herein contained shall be held or "construed as an admission on the part of the House "of Representatives that custom duties can be "changed otherwise than by an Act of Congress, "originating in said House."

This Act does not deal with the convention, excepting to such extent as it legalizes the reduction, in favor of merchandise, the product of the soil or industry of the Republic of Cuba imported into the United States, below the rate of duties fixed by the Tariff Act of the United States.

On the 17th December, 1903, the President issued his proclamation, in which he recited that there had been an exchange of ratifications of the convention by the two Governments in the city of Washington, on the thirty-first day of March, 1903; that the Senate of the United States had added, at the end of Article XI, the amendment above recited; and that Congress had given its approval to said convention by Act approved 17th December, 1903. He proclaimed that satisfactory evidence had been received by him that the Republic of Cuba had made provision to give full effect to the articles of said convention; and that the said convention, as amended, was in effect on the tenth day from the date of his proclamation.

From this recital it appears that we must deal, not so much with the interpretation of an Act of Congress, as with an interpretation of a contract entered into between two Governments, one of which did not participate in said Act.

We submit that it is not necessary to consider the effect of the requirement of the Act of 17th December, 1903, referring to the receipt by the President of the United States of "satisfactory evidence that the Republic of Cuba "has made provision to give full effect to the articles of "the convention," because the receipt of such evidence was merely made a condition to the issuance of a proclamation, which would announce that the convention was in force according to its own terms.

The discussion will involve a consideration of the subject under five heads:

I. The commencement of the Term during which the convention was to be in force according to the original provisions thereof.

II. The effect upon the commencement of the term of the convention of the addition of the words, "This convention shall not take effect until the "same shall have been approved by the Congress."

III. The effect, if any, upon the time of commencement of the term of the convention, of the Act of Congress of 17th December, 1903.

IV. As, in the case of the New York importations, there was a suspension of the liquidation until a date subsequent to December, 1903, ultimate liquidation was required to be made under a reduction at that time conceded to be in force.

V. In the case of the Philadelphia importations, the liquidation was not made until after December, 1903, and was therefore required to be made in accordance with the Tariff Act as then in force.

I. The commencement of the term during which the Convention was to be in force according to the original provisions thereof.

We contend that by the convention itself, the term of its duration was fixed, viz., five years from the tenth day of April, 1903, which date was ten days after that of exchange of the ratifications by the respective Governments.

This contention rests upon the unequivocally expressed provision that "the convention shall go into effect on the "tenth day after the exchange of ratifications, and shall "continue in force for a term of five years from the date "of going into effect."

The treaty, as made by the respective plenipotentiaries,

after execution by them, required the confirmation of the Presidents of the respective Governments, and of the Senates of each country.

Until these confirmations, there could be no exchange of ratifications, and of course it was necessary to provide that it should not go into effect until such exchange, which would amount, practically, as between the two contracting parties, to a mutual delivery of an executed and confirmed deed.

As originally drafted, the convention must have failed altogether, because of the inability to exchange ratifications on or before the thirty-first day of January, 1903. The supplemental convention which was entered into, was requisite to save such failure; but it still remained necessary the exchange should take place on or before the thirty-first day of March, 1903.

What has already been recited concerning the provisions of the convention shows that in every instance it was prescribed that the reduction, &c., should continue "during the term of this convention." This made it absolutely necessary, therefore, that in the convention itself the "term" thereof, should be prescribed.

Nothing could more clearly have expressed the time of commencement of the term than the words which, as to the treaty, declared that it "shall go into effect on," &c.

There was an obvious reason why a limit of time for commencement of the reduction was fixed. The principal product which would be imported into the United States from Cuba would be sugar. The negotiations for the Treaty were conducted, we may assume, in anticipation of the exportation to, and importation into, the United States, of the crop for 1902. In the ordinary course of trade, this crop would begin to be imported in February, 1903, the importations being at their maximum in April, and ceasing substantially on the first day of July.

The date originally fixed for the commencement of the reduction would have given the whole of this crop the benefit thereof. Only because of necessity, this date

was so extended that the convention would not give the benefit of the reduction until the early part of April, 1903. It was important, however, to secure the earliest possible date of commencement, to cover as much as possible of that crop. An extension of the date to December, 1903, would have lost to Cuba the benefit of a reduction upon a crop which was undoubtedly in the minds of both the contracting parties.

II. The effect upon the commencement of the term of the Convention of the addition of the words, "This Convention shall not take effect until the same shall have been approved by the Congress."

Of course we must deal with the effect of words inserted, at the instance of the Senate of the United States, in accordance with the report of its Committee on Foreign Relations; providing that "This convention shall not take "effect until the same shall have been approved by the "Congress."

Can it be successfully contended it was *intended* by the Senate or by any of the parties to the treaty, that the contract itself was meant to be altered, either in the matter of its term—the beginning or the end thereof—or in any other particular?

Whatever may be urged as to the interpretation of the convention, with these words inserted, we submit it cannot be urged, with conviction, that the intent was to *alter*, or to do anything other than to guard against the possibility of its becoming non-enforceable because of its affecting a tariff duly enacted by the Congress of the United States.

One of the provisoes, inserted in the Act, discloses the jealousy of the House of Representatives of its right, claimed by it to exist, that customs duties could not be changed other than by "an Act of Congress originating "in said House."

The Senate, it may be assumed, was equally jealous of its right of approval of treaties without any consent of

the House of Representatives. We think it may be asserted, confidently, it was not intended by the Senate, that Congress should approve the treaty, but simply that it should give approval to what might be necessary, in the way of legislation, in removing all possibility of question of enforcement in the United States, of its conditions.

Of course, in considering the effect of the insertion, we must admit, that, ordinarily, matter added at a subsequent date, inconsistent with what had theretofore been done, ought, to the extent of the inconsistency, to be construed as would a codicil to a will or a supplemental article to an agreement.

We may, however, insist that if it had been intended to alter the term of the convention, this would have been done by striking out the words "the convention shall go "into effect on the tenth day after the exchange of rati-"fications," and by substituting therefor, the words "the "convention shall go into effect upon the same being ap-"proved by the Congress," not, however, prior to the tenth day after the exchange of ratifications. The words are not "This convention shall not go into effect until the "same shall have been approved by the Congress," but are, "This convention shall not *take* effect until," &c.

The Senate knowing it had been provided the term should commence "on the tenth day after the exchange "of ratifications," did not alter said provision; but knowing, also, that a question existed as to the right to make any treaty which altered a revenue law, it directed that though the term should continue as prescribed, the convention itself should not be effective until approved by the Congress. The approval, as we have suggested, however, was not to be of the treaty, as such, but of the doing of that which affected the revenue law.

No doubt as to the actual intention of the Senate can exist, in view of the explanation of Senator Bacon, and of what was said in its Committee's report as to the ratification of certain reciprocity treaties to which we have already referred. This report shows that the Senate con-

sidered the words, "prohibiting the taking of effect until the "same shall have been approved by Congress," as the equivalent of the words, "shall not take effect without the "approval of Congress."

It was not intended by the Senate, by the insertion of these words, to affect the exchange of ratifications. It was evident that if this should not take place on or before the 31st March, 1903, the convention would fall, by its own terms. Knowing that the ratifications must be thus exchanged, it was obvious the term must commence, anterior to the time when Congress could act, inasmuch as it had adjourned, the Senate being in session under a special call.

The Senate must be assumed to have known that the exchange of ratifications which must take place, would put the convention in the position of a deed delivered in escrow. A deed, thus delivered, it is well settled, when the *escrow* terminates, will be treated as effective as of the date of such conditional delivery.

We must read article XI., it is true, with the words we are considering added, but we must read it as a whole, not simply the added words.

The rules of construction require that so far as may be, all parts of an agreement shall be regarded. If it had been intended the added words should repeal those first used, it would have been so said.

Presumably the original words were meant to continue to have effect, because they were allowed to remain, without alteration.

An interpretation can be made which will render the whole of the article effective—that for which we contend—holding the term to continue without alteration, but the convention itself not to have been a binding obligation until something had been done by Congress by way of legislation, necessary, or at least deemed desirable.

In other words, when the Senate said: "The Treaty should not take effect *until* the same shall have been approved by the Congress," it meant only that: "This Treaty shall not take effect *unless* it shall be approved by

the Congress." The word "until" was used, with no idea of expressing futurity; but to convey the implication that in all human probability the condition was one which would, in due time, be fulfilled. The Cuban Government might rely on the assurance of this. See 6 Op. Atty. Gen. 296 Cush:—

> "When a Treaty cannot be executed without the "aid of an Act of Congress, it is the duty of Congress "to enact such laws. Congress never failed to per- "form that duty."

It is pre-eminently necessary, in the interpretation of a contract between two parties, that words, added at the instance of one shall be so construed, if possible, as to give effect to that part thereof which represents the intentions of both, because made by both.

As this court has held, in the absence of any expression to the contrary, in the case of a treaty, it becomes binding, immediately upon the exchange of ratifications. In the present case, the binding force was agreed to be postponed for ten days.

Had Congress failed to legislate, the convention must have failed, because of the inserted provision; but inasmuch as it enacted what was necessary, the only bar to its enforcement, in accordance with its exact terms as drafted, was removed.

It was not intended by the added words to permit Congress to modify the treaty. Such modification would be the action of but one, of two, contracting parties. Whatever Congress might do, necessarily must be done in the way of approval or rejection of the convention as written.

In this connection it might not be amiss to refer to what seems to have been the view of the Board of General Appraisers, judging from the language following (Record in No. 269 p. 9):—

> "The Act of Congress approving the treaty, in one "aspect, seems from its language to indicate that it "was not to go into effect until the President has

"received and passed on the evidence required to be "considered by him, and it must be satisfactory to "him, showing that the Republic of Cuba had made "provision to give full effect to the Articles of the "Convention."

Any such construction, however, would make a treaty, which represented the agreement of the two Governments, take effect, only when the President of one should see fit to issue his proclamation.

As has been held by this court, in Field *vs.* Clark, 143 U. S., 649, Congress may provide that the date from which reciprocity provisions in an Act shall take effect may be fixed by a proclamation of the President; but in the present case, there was no provision that the President, by his proclamation, should fix the time from which the treaty should take effect.

In the Field case, the Act which was considered, was that of 1st October, 1890, which prescribed, in terms, that the President, by his proclamation, might suspend provisions relating to the free introduction of sugar.

III. The effect, if any, upon the time of commencement,of the term of the convention of the Act of Congress of 17th December, 1903.

In determining the meaning and effect of the Act of Congress it is necessary to bear in mind the fact that it is the meaning of the convention, not that of Congress, as embodied in this Act, which we must ascertain, the first being the act of the two contracting parties, whilst the latter emanates only from one.

No construction will be given to the Act which, in any way, will affect the contract. It was in the power of Congress to refuse to legislate by way of amendment of the Tariff Act, but it possessed no other power in the matter.

The beginning, and the end, of the Act, was the removal of any bar in the way of a question as to the right, in the United States, to make valid a treaty, which provided for the payment of duties upon imports, less than those which had been prescribed by Act of Congress.

As we have seen, by reference to the Act itself, nothing more was attempted, and we would expect, in the Act, to see no dealing, interfering with the term, or with the conditions, of the convention.

We would expect the Act of Congress would recognize the fact that by treaty, for a period of time, it had been agreed the customs duties should be reduced, and that, during such period, this reduction would be legalized.

The title of the Act indicates its purpose, viz., "An Act "to carry into effect a convention between the United "States and the Republic of Cuba, signed on the eleventh "day of December in the year nineteen hundred and "two"—not an Act to alter the convention, the time of its beginning or ending, or the conditions thereof, but one to *carry into effect* such convention, as executed.

If the Act does not go beyond the purpose disclosed by its title, it cannot be so construed as to affect in any way the agreement. The convention itself, being reciprocal, grants to those exporting from the United States to Cuba certain reductions and exemptions. With these the Act of Congress does not attempt to deal. So far as the convention dealt with the importation into the United States of certain articles, it was necessary, or was thought advisable, to provide. Such provision, and none other, was made.

It was necessary to permit a reduction of the tariff duties during the whole term in which, by the convention, it was provided they should be reduced.

What was the term during which legislation was required and was enacted?

Congress, recognizing, to the full, the fact it could not alter the convention without destroying the same, therefore provided that "so long as the said convention shall re- "main in force" importations should be permitted, at the reduced rate of duty.

It was well, in permitting the reduction during the time the convention should remain in force, to allude to the term thereof, not by way of approval, or disapproval, of such duration, but of recognition of the time during which the Act would be in effect.

The President was therefore authorized to issue his proclamation upon the receipt of certain evidence. Thereupon, on the tenth day after exchange of ratifications of such convention between the United States and the Republic of Cuba, and "so long as the said convention shall remain "in force, * * * all articles of merchandise being the "product of the soil or industry of the Republic of Cuba "imported into the United States shall be admitted at the "reduction of 20 per centum of the rates of duty thereon "as provided by the Tariff Act of the United States, "approved July 24th, 1897."

In the convention, a time for its commencement has been prescribed, ten days after the exchange of ratifications; the duration to be five years. A provision was inserted which had suspended the putting into effect of the convention until the obtaining of the Act of Congress we are considering. This Act, when obtained, provided that the term should begin and end as had been originally directed.

Is it possible to say that Congress intended the reduction should also begin at a date not less than ten days after the passage thereof, viz., not before the 27th of December, 1903, when, knowing there had been an exchange of ratifications on the thirty-first day of March, 1903, it directed that the reduced duty should be payable for a term of five years from "the tenth day after the exchange of ratifications"?

The convention was intended to be in force, as was unequivocally expressed, for five years. If it be held the reduction of duty began only after the twenty-seventh day of December, 1903, the Republic of Cuba acquired, by virtue of the convention, the right to export at the reduced rate into the United States, not for five, but for less than five, years.

The Act of Congress, being enacted by the Senate as well as by the House of Representatives, is a cotemporaneous construction, by the Senate, of its meaning when it caused to be inserted into the convention, the words, "this conven- "tion shall not take effect until the same shall have been "approved by Congress."

The question is not affected by the fact that importations had taken place between the thirty-first day of March and the twenty-seventh day of December, 1903, some of which had been attempted to be liquidated under the provisions of the Act of 1897. The New York liquidations, involved in the cases before this court, were made under such circumstances as permitted a reliquidation, and in fact only after December 1903, as we shall endeavor to show. The Philadelphia importations were not liquidated until after December, 1903. Even if duties had been collected antecedently to the passage of the Act of Congress it would become the duty of the United States, in favor of Cuba, whose products had been overcharged, to provide for a refunding.

The Republic of Cuba was entitled, under the convention, to demand that its products should be admitted into the United States after the tenth day of April, 1903, at the reduced rate.

The Board of General Appraisers referred to the decision of this court, in United States *vs.* Burr, 150 U. S., 78; but in that case it clearly appears, by a review of the history of that Act, that it was intended by Congress the duties should not go into effect until after its passage. In that case the bill was introduced into the House of Representatives on the 10th December, 1893, and was passed by it on the first day of February, 1894. As then passed the Act provided it should go into effect "on or "after the first day of January, 1894, unless otherwise es- "pecially provided."

The bill was laid before the Senate on the 2d February, 1894, and was reported to it, by its Finance Committee, on the 22d March, 1894. When so reported, it contained the date of the 30th June, 1894, instead of that of the first day of January, 1894. As thus amended, the Senate passed the bill on the 3d July, 1894, the date having been altered, in the meanwhile, from the 30th June, 1894, to the 1st August, 1894. Because of a long discussion and

deliberation by the Committees of Conference, the bill, as it had been amended in the Senate, was not finally passed by the House until the 13th August, 1894.

Nothing could more clearly have disclosed the intention of Congress, through all its stages, that the Act should not become effective until after its passage, than was shown by what was done in changing from time to time, the date at which it should go into effect.

As finally enacted, it did not actually repeal the prior Act of 1st October, 1890, in terms, until the 28th August, 1894, and its repealing section expressly kept in force the right and liability of the Government or of any person, which had been incurred or accrued, prior to its passage.

Congress, in passing the Act of December, 1903, did so with the knowledge that at that time the ratifications of the convention had been exchanged. With this knowledge, it provided that the reduction should be for a term commencing "on the tenth day after exchange" of such ratifications.

Can it be, if Congress intended the reduction should only commence after the passage of the Act, that it would have adopted, for its commencement, the happening of an event which had already occurred?

We recognize the fact that a construction will usually be put upon an Act which will not make it retroactive, but where it was incumbent on the body which passed the Act, to make it retroactive, and where words were adopted which can only be properly construed as producing such result, no canon of construction can be invoked which will defeat the performance of a duty clearly intended to be performed.

To sustain the decision of the Board of General Appraisers it would be necessary to hold that words, inserted for the purpose of delaying the binding effect of a contract, which stipulated for the doing of something at a period, to commence at a designated time and to endure for five years, were inconsistent with what was prescribed by the contract as to the actual period of its duration.

Such construction would require a disregard of the purpose in inserting the words in question, and the plain intendment of everything done by those who understood the reason of such insertion.

To illustrate: A. and B. enter into a contract by which A. leases certain premises to B. for a prescribed term of years. Something requires to be done for A. in the way of removing a question as to his power to execute the lease. He provides that despite the execution he shall not be bound until that something is done. Would it be inferred from such provision that he intended the term itself should be limited?

Would it be so inferred if, at the time the thing was done, A. had declared that the original term should continue, as originally agreed?

As originally drafted, the time of commencement, not later than ten days after the thirty-first day of January, 1903, or, as provided for in the supplement, not later than ten days after the thirty-first day of March, 1903, was unquestionably deemed important.

Nothing appears in the record disclosing any intention on the part of either of the contracting parties, certainly not on the part of the Republic of Cuba, to alter the time of commencement.

IV. In the case of the New York importations, as there was a suspension of the liquidation until a date subsequent to December, 1903, the ultimate liquidation conwas required to be made under a reduction at that time conceded to be in force.

We will consider this proposition under three subdivisions:—

1. The effect of the importers' protest and appeal from the decision of the Collector to the Board of General Appraisers was to suspend the liquidation of the duties upon merchandise until after its disposition of the appeal; which was not made until April 1904 (fols. 13, 21), months after the Cuban Treaty had become the law of the land.

This principle is the necessary result of the language of the Customs Administrative Act and the revisory powers with which it endows the Board of General Appraisers.

The Act of June 10, 1890, provides: —

> SEC. 14. "The decision of the Collector as to the "rate and amount of duties * * * shall be final "and conclusive * * * unless the owner, etc., "shall * * * if dissatisfied with such decision, "give notice in writing to the Collector, setting forth "therein distinctly and specifically * * * the "reasons for his objections thereto. * * * Upon "such notice and demand the Collector shall transmit "the invoice and all the papers and exhibits con- "nected therewith to the Board of three General Ap- "praisers * * * which Board shall examine and "decide the case thus submitted; and their decision "or that of a majority of them shall be final and con- "clusive upon all persons interested therein, and the "record shall be transmitted to the proper Collector "or person acting as such, *who shall liquidate the entry "accordingly; except* in cases where an application "shall be filed in the Circuit Court," etc.
>
> "SEC. 15. "If the owner, etc., shall be dissatisfied "with the decision of the Board of General Apprais- "ers, etc., they, or either of them, may within thirty "days next after such decision and not afterwards "apply to the Circuit Court of the United States "within the district in which the matter arises for a "review of the questions of law and fact involved in "such decision. * * * The decision of such Court "shall be final, and the proper Collector or person "acting as such *shall liquidate the entry accordingly*, "*unless* such Court shall be of opinion that the ques- "tion involved is of such importance as to require a "review of such decision by the Supreme Court of "the United States," etc.

In United States *vs.* Goldenberg, 168 U. S., 95, 100: *Mr. Attorney-General, arguendo said:*—

> "The finality of the Collector's decision is destroyed "by filing the protest. Until decision by the Board "of General Appraisers it remains open to review."

2. If, while the importer's protest and appeal were pending *sub judice*, either before the Board of Appraisers or before the Circuit Court, and while the duties therefore still remain unliquidated, so much of the statute as imposed upon these imports more than eighty per cent. of the general tariff rates was repealed, as of a date prior to that of the importation, it was the duty both of the Board of Appraisers and of the Circuit Court to give effect to the repeal and to reverse the Collector's decision, even though correct when made. 26 Am. & Eng. Ency. of Law, 2nd Ed., p. 748:—

> "Though it is, as a general rule, the province of "an appellate court to inquire only whether the judg- "ment appealed from was in accordance with the law "at the time it was rendered, yet if, pending the ap- "peal, the law which authorized the judgment is re- "pealed, the judgment must be reversed."

United States *vs.* Schooner Peggy, 1 Cranch, 103: During the War with France an armed French vessel had been captured, and, on September 23rd, 1800, condemned as a lawful prize by the Circuit Court. From this judgment of condemnation a writ of error was prosecuted to this Court. While the case was pending in this Court on December 21st, 1801, a convention between France and the United States, was ratified, the fourth articles of which provided that "property captured and not yet definitely condemned * * * shall be mutually restored."

This Court speaking through Mr. Chief Justice Marshall said:—

> "In this case the sentence of condemnation was "appealed from. It might have been reversed and "therefore was not such a sentence as in the contem- "plation of the contracting parties, on a fair and hon- "est construction of the contract, was designated as "a definitive condemnation.
>
> "It has been urged that the Court can take no

"notice of the stipulation for the restoration of prop-
"erty not yet definitely condemned; that the Judges
"can only inquire whether the sentence was erroneous
"when delivered and that if the judgment was correct
"it cannot be made otherwise by anything subsequent
"to its rendition.

"The Constitution of the United States declares
"a treaty to be the supreme law of the land. Of con-
"sequence, its obligation on the courts of the United
"States must be admitted. * * * It is, in the
"general, true that the province of an appellate court
"is only to inquire whether a judgment when ren-
"dered was erroneous or not, but if subsequent to
"the judgment and before the decision of the appel-
"late court, a law intervenes and positively changes
"the rules which govern, the law must be obeyed
"or its obligation denied. If the law be con-
"stitutional, and of that no doubt in the pres-
"ent case has been expressed, I know of no
"court which can contest its obligation. It is
"true that in mere private cases between indi-
"viduals the Court will and ought to struggle hard
"against a construction which will, by a retrospective
"operation affect the rights of parties; but in great
"national concerns, where individual rights acquired
"by war are sacrificed for national purposes, the con-
"tract making the sacrifice ought always to receive
"a construction conforming to its manifest import.
"* * * The Court must decide according to ex-
"isting laws and if it be necessary to set aside a judg-
"ment rightful when rendered, but which cannot be
"affirmed but in violation of law, the judgment must
"be set aside."

It is plain that the case at bar is well within the decision in the case of "The Peggy"; where this Court resolutely gave effect to the "manifest import" of an international compact, althought recognizing that it thereby required for national purposes a sacrifice of individual rights, duly adjudged, of our own citizens. In the case at bar, it would be not the enforcement of the treaty but a refusal to enforce it according to its manifest import, which

would entail a sacrifice of individual rights; to wit, the right of the Cuban exporter and the American importer of these sugars to bring them into this country after the ratification of the treaty at eighty per cent. only of the former duty. By the enforcement of this treaty nothing is sacrificed except the right of the Government to the additional twenty per cent. of duties, to sacrifice which was the very purpose of the Government in making the treaty.

3. While the importers' protest and appeal were still *sub judice* before the Board of Appraisers, and before the duties had been liquidated; so much of the statute as imposed more than eighty per cent. of the regular duties upon these imports was repealed, and the repeal by its very terms took effect as of a date prior to the date of the importation.

It was not until April 28th, 1904, that the Board of Appraisers acted upon the importers' protest and appeal. In the meantime the Cuban treaty upon its approval by Congress on December 17th, 1903, four months before, had become the law of the land. Article II. of that treaty provided that "during the term of this convention" all Cuban sugars should be admitted at a reduction of twenty per cent; and as to the term of the convention that it should "go into effect on the tenth day after the exchange or ratifications, and continue in force for the term of five years from the date of going into effect." The tenth day after the exchange of ratifications was April 10th, 1903. The sugars were imported in June, July, August and September, 1903. (fol. 3).

V. In the case of the Philadelphia importations, the liquidation was not made until after December, 1903, and was therefore required to be made in accordance with the Tariff Act as then in force.

All that has been said under the fourth head, applies with greater force under the present, where there was no liquidation until after the convention was concededly in effect.

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